Supreme Court, U.S.
FILED
APR 23 1979
MICHAEL RODAK, JR., CLERK

No. 78-1270

In the Supreme Court of the United States

OCTOBER TERM, 1978

LARRY WAYNE McDANIEL, PETITIONER

v.

United STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1270

LARRY WAYNE McDANIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 574 F. 2d 1224.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1978. The petition for a writ of certiorari was filed on February 15, 1979, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record supports the finding that airline personnel who had conducted a private search of an unclaimed briefcase containing two firearms voluntarily turned the briefcase and its contents over to a federal agent.

2. Whether the trial court abused its discretion in admitting into evidence a shirt found in the same briefcase because the shirt had the word "Outlaws" printed on it.

STATEMENT

Following a jury trial held in the United States District Court for the Northern District of Georgia, petitioner, a previously convicted felon, was found guilty of receipt of a firearm that had moved in interstate commerce, in violation of 18 U.S.C. 922(h), and was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence adduced at the pretrial suppression hearing showed that on January 19, 1977, petitioner checked his briefcase when he took a Delta Airlines flight from Atlanta, Georgia to Tampa, Florida (S. Tr. 79). The briefcase was misrouted however, and arrived in Manhattan, Kansas, where it was received and held by Frontier Airlines when it was not claimed (S. Tr. 11-16). Because there was no external identification on the unclaimed briefcase, a Frontier supervisor opened the briefcase to discover the identity of its owner (S. Tr. 11-16). Inside the briefcase were two loaded firearms, what appeared to be narcotics, and some clothing, including a shirt with the word "Outlaws" printed on it (S. Tr. 17-18). The supervisor reported the discovery to the local police, who in turn notified the Bureau of Alcohol, Tobacco and Firearms, which sent an agent to the airport to recover the briefcase and its contents (S. Tr. 29). When the agent asked for the briefcase, an airline employee at first refused, saying a warrant was required (S. Tr. 21). On the agent's suggestion, the employee called a supervisor, who authorized him to turn the briefcase over without a warrant (S. Tr. 21, 29). The airline employee and the agent then reopened the briefcase, and inventoried its contents (S. Tr. 21-22, 35-36).

After an evidentiary hearing the magistrate recommended that petitioner's motion to suppress the contents of the briefcase be denied, and the district court followed his recommendation (Tr. 11-16). Both the firearms and the shirt with the word "Outlaws" printed on it were admitted into evidence at trial.

ARGUMENT

1. As petitioner apparently concedes, the court of appeals was correct in holding (Pet. App. A-3) that the Fourth Amendment applies only to government searches and seizures, not to a search by a private party who then voluntarily gives the evidence he has discovered to government agents. See, *e.g.*, *Burdeau* v. *McDowell*, 256 U.S. 465, 475-476 (1921); *United States* v. *Lamar*, 545 F. 2d 488, 490 (5th Cir.), cert. denied, 430 U.S. 959 (1977); *United States* v. *Crabtree*, 545 F. 2d 884, 885-886 (4th Cir. 1976); *United States* v. *Sherwin*, 539 F. 2d 1, 5-7 (9th Cir. 1976); *United States* v. *Capra*, 501 F. 2d 267, 272-273, n. 4 (2d Cir. 1974); *United States* v. *Blanton*, 479 F. 2d 327, 328 (5th Cir. 1973); *Barnes* v. *United States*, 373 F. 2d 517 (5th Cir. 1967).

Petitioner contends (Pet. 13), however, that the lower courts erred in concluding that the airline voluntarily turned over the briefcase and its contents. This contention is without merit. "Voluntariness is a question of fact to be determined from all the circumstances," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973), and the record amply supports the findings of both courts below that the airline voluntarily turned the briefcase over to the federal agents.

When the federal agent first sought to take possession of the briefcase, an airline employee stated that he had been instructed not to give it up without a warrant. But when the agent replied that he did not believe that a warrant was required, the employee checked with the airline security director, who told him to give the agent the briefcase (S. Tr. 21, 29). The airline employee denied that the agent had "command[ed]" him to turn over the briefcase, and he testified the security director told him, " 'If the ATF wants the bag, give them the bag' " (S. Tr. 21).

Petitioner emphasizes the employee's testimony that he related to the security director the agent's statement that he did not believe he needed a warrant (S. Tr. 21, 29). But this is not a case like *Bumper* v. *North Carolina*, 391 U.S. 543, 549 (1968) (footnote omitted), where the claimed consent was "no more than acquiescence to a claim of lawful authority." The record establishes that the airline employee understood the agent's statement as tentative, not commanding: "[H]e says, 'I don't believe I need one in this case * * *' " (S. Tr. 29). And although the employee did repeat the agent's statement to his supervisor when he called for further instructions, there was no showing that the supervisor ordered the employee to turn the briefcase over because he believed he was required to acquiesce. Indeed, if anything, the employee's testimony suggested that his supervisor had told him that the airline's policy of requesting a warrant applied only to local police. The employee stated that the only reason he asked the ATF agent for a warrant was because he had been instructed by the director of security to require a warrant if "the locals" wanted to take the briefcase, and the employee then added that he didn't "know one police department from another" (Tr. 36).

In view of all the testimony, the lower courts' findings that the airline made a private search of the briefcase and then voluntarily turned it over to the agent cannot be said to be clearly erroneous.[1]

2. Petitioner also contends (Pet. 16-18) that the district court improperly permitted the introduction of evidence of his bad character by admitting the t-shirt bearing the word "Outlaws."

This claim is also without merit. The shirt, which was found in the briefcase, was relevant evidence that petititioner was the owner of the briefcase. Petitioner's nickname was "Larry Mack," and a pin bearing the word and emblem "Mack" was found attached to the shirt (Pet. App. A-5). However, because petitioner argued that introduction of the shirt would be prejudicial, inflaming the jury's prejudices and branding him an "Outlaw," the trial court had the discretion under Fed. R. Evid. 403 to exclude the shirt "if its probative value [was] substantially outweighed by the danger of unfair prejudice * * *." The court of appeals correctly concluded (Pet. App. A-5) that the

---

[1]The cases upon which petitioner relies are inapposite. In *United States* v. *Kelley*, 529 F. 2d 1365, 1372-1373 (8th Cir. 1976), the court held that the government's warrantless seizure of books and magazines discovered in a private search violated the Fourth Amendment because "the proper seizure of books and magazines, which are presumptively protected by the First Amendment, demands a greater adherence to the Fourth Amendment warrant requirement." The court stated that the books and magazines had been "seized" by a government agent (not voluntarily turned over by a private party), and the court expressly distinguished books and magazines from firearms, which the agent might have seized without a warrant. 529 F. 2d at 1372. In *Corngold* v. *United States*, 367 F. 2d 1, 4-5 (9th Cir. 1866), the court found that the search had been conducted at the behest and solely for the interests of the law enforcement officers, and accordingly it was not a "private" search. Finally, *United States* v. *Chadwick*, 433 U.S. 1 (1977), did not involve a private search in any way.

district court did not abuse its discretion by admitting the shirt. The record contains no support for petitioner's charge that the government intended to use the shirt to put petitioner's character at issue and to portray him as an "Outlaw." The government did not point out the word "Outlaws" on the shirt and never suggested that the word was probative of petitioner's character.[2] Since "[t]he duty of weighing the probative value of the [] evidence against its prejudicial effect rested squarely on the shoulders of the experienced trial judge," whose discretionary determination should not be reversed unless he acted "arbitrarily or irrationally," *United States* v. *Robinson*, 560 F. 2d 507, 514-515 (2d Cir. 1977) (*en banc*), cert. denied, 435 U.S. 905 (1978), the court of appeals correctly rejected petitioner's claim of error. See *United States* v. *Long*, 574 F. 2d 761, 767 (3d Cir.), cert. denied, No. 78-626, (Nov. 27, 1978); *United States* v. *Cowsen*, 530 F. 2d 734, 738 (7th Cir.), cert. denied, 426 U.S. 909 (1976).

---

[2]Indeed, although the shirt was identified by the government's witnesses and introduced into evidence (Tr. 79, 86-89, 123, 129), it is not entirely clear that the jury ever saw the word printed on it. At the time of petitioner's first objection, when the shirt was identified by the government witness, the district court stated that neither he nor the jury could read the word on the shirt when the witness handled it (Tr. 87-88), and we have found no indication in the record that the shirt was later displayed in a different fashion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

FRANK J. MARINE
Attorney

APRIL 1979

DOJ-1979-04